

# *Dissent: Towards a Methodology for Measuring Judicial Disagreement in The High Court of Australia*

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## ***1. Introduction***

In a recent exchange on empirical research and legal scholarship, the American scholars Epstein and King have lamented the ‘unmet need for a subfield of the law devoted to empirical methods, and the concomitant total absence of articles devoted exclusively to solving methodological problems unique to legal scholarship’.<sup>1</sup> Although their contribution is then subjected to fairly acerbic critical comment,<sup>2</sup> there seems general agreement with this demand for greater articulation of method in empirical studies of the law and legal systems.<sup>3</sup> Although this article was not written as a direct response to this call, it serves as an example of an attempt to transparently design a quantitative methodology for the purpose of gaining greater understanding of a phenomenon of the Australian legal system, specifically the levels of dissent on the High Court of Australia.

This article aims to be the start of a lengthier consideration of dissent as a relational concept, and the design of a methodology for measuring it is an excellent means of drawing out what is meant by this approach — quite in addition to the value of results which such a methodology may yield through subsequent application. Dissent may be seen to be relational in two particular senses. Firstly, a dissent is not made by one judge alone but rather may be more properly viewed as the outcome of a dialogue involving his or her colleagues on the bench — or perhaps even the result of a breakdown in harmonious discourse. This may seem obvious but the point acquires real force upon reflection of the occasional

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<sup>1</sup> Lee Epstein & Gary King, ‘The Rules of Inference’ (2002) 69 *UChiLR* 1 at 6.

<sup>2</sup> Of which Epstein and King say, ‘... the norms of disinterested scholarship, impartial analysis, and the absence of intentionally misleading arguments are clearly missing from these reviews’: Lee Epstein & Gary King, ‘A Reply’ (2002) 69 *UChiLR* 191 at 196.

<sup>3</sup> For instance, Cross, Heise and Sisk concur that ‘articles should be fully transparent in their procedures and claims, which necessarily requires that researchers use more rigor in presenting their methodology and inferential claims’: Frank Cross, Michael Heise & Gregory C Sisk, ‘Above the Rules: A response to Epstein and King’ (2002) 69 *UChiLR* 135 at 150.

examining and explaining that role, and willing to expose unfair attacks against judges and judicial independence to the clear light of reason.

I began by asking whether citizens, the public, the media should be permitted to say practically anything they please about judges and the courts. My answer to that question is, 'Yes.' Justice Felix Frankfurter, who initially did not warm to the idea, and who dissented in the *Bridges* case,<sup>64</sup> may have the last word on that subject. Writing five years after *Bridges* to concur in reversing a contempt of court judgment against an editor and his newspaper, he reminded us:

A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other: both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.<sup>65</sup>

But should that same freedom be extended to judges to express their views on subjects that may come before them, even if they are elected to their office? I doubt that even Justice Hugo Black, whose decision in *Bridges* pointed the United States down a new path, would go that far.

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<sup>64</sup> See, for example, *Bridges v California*, above n3 at 280, in which Frankfurter J accused the majority of 'render[ing] states powerless to insist upon trial by courts rather than trial by newspapers'. Ironically, a weighty factor in Frankfurter J's dissent was that a California judge criticised by a *Los Angeles Times* piece at issue would soon stand for re-election and thus would be particularly vulnerable to threats from 'a powerful newspaper'. See id at 299 (Frankfurter J dissenting).

<sup>65</sup> *Pennekamp v State of Florida* 328 US 331 (1946), 355 (Frankfurter J concurring).

difficulty in clearly identifying solid majorities in final courts. The relationship between dissent and the lesser form of judicial disagreement represented by a concurring judgment is much more complex than appearances suggest. It may well be that it is the mechanism of concurrence which is capable of posing more notable difficulties to the attainment of certainty of principle. The second relational aspect of dissent derives not simply from the interaction between the judges themselves but rather the more linear connection between an individual Justice and 'the Court' as an institution. As shall be seen, a dissent is so classified through use of the court's final orders as the ultimate yardstick of consensus.

In Part 2 of this article, the motivation for devising an empirical methodology for collecting statistics on dissent will be explained. It is submitted that this exercise is a valuable one beyond its obvious purpose of producing a tool to be employed by empiricists, and presents opportunities for conceptual reappraisal of much that is taken for granted by legal scholars when they discuss judicial opinions. This will become clear in Part 3 where it will be argued that the deceptively simple definitions of 'dissent', 'concurrence', 'majority' and 'minority' are more than a little difficult to apply in respect of particular kinds of cases due to the *seriatim* tradition followed by Australian courts. The scheme employed by the *Harvard Law Review* for its annual statistics on the latest term of the United States Supreme Court will be adopted as the starting point for this discussion. The use of this source may be surprising to some, but as shall be seen, despite distinct differences between the judicial method of that court and the High Court of Australia, there remains a central point of commonality between the American understanding of dissent and that which prevails in this country. Also, it makes sense to consider a functioning classification system which has provided an acceptable empirical method for several decades. Of course, the *practices* of the United States Supreme Court far from mirror those of the High Court of Australia and to the extent that they are relevant to this particular exercise, these differences are noted in discussing the applicability of the *Harvard Law Review* scheme to the latter's decisions. The *Harvard* rules are then suitably modified to enable accurate quantification of dissent in this jurisdiction.

In Part 4, the responsiveness of the methodology proposed at the conclusion of the preceding Part is considered in respect of a series of test cases. There are two purposes to this exercise. Firstly, it uses concrete examples to bear out many of the problems of complexity discussed up to this point. Secondly, it demonstrates how the method of classification adapted from the *Harvard* scheme will work in practice. Not all of the results which are produced may appear immediately logical or acceptable. The case studies highlight the inherent limitations which must attach to any attempt to measure dissent in the High Court. Many of these result from the relational nature of disagreement in law and the difficulty of classifying judgments due to a greater fluidity between majorities and minorities than is usually acknowledged. But despite the occasional challenge to a conventional appreciation of judicial opinions, it will be argued that the method selected and applied here presents the best means of ensuring reliable and valid statistics on dissent. The fact that these test applications expose the limitations of the methodology does not

mean that it is flawed — rather it illustrates the inevitable restrictions of empirical work generally.

Thus the paper has three purposes. Firstly, it seeks to highlight the conceptual and practical challenges faced by those attempting either to statistically measure, or just generally appreciate, the extent of disagreement as it is evidenced by dissenting judgments in the High Court. Secondly, it proposes a methodology designed to best overcome the problems facing an empirical researcher of this topic, whilst also ensuring consistency of application and the possibility of replication. Thirdly, consideration is then given to the question of whether an empirical study of dissent (either per se or as opposed to an inquiry based upon less rigidly technical concepts, such as, say, ‘minority’) is a worthwhile exercise to pursue in light of the inescapable limitations encountered through an application of the methodology devised here. The author concludes that on balance, there is a great value in the performance of such work. An attempt to understand dissension within the High Court of Australia which is not informed by empirical data indicating the prevalence of dissent amongst its members and across its history suffers from an obvious deficiency. Conversely, the production of a set of figures will tell us something but, divorced from deeper analysis which overcomes the inevitable constraints of methodology and provides contextual reference, is of limited worth.<sup>4</sup>

## ***2. The Value of an Empirical Study of Dissent***

Before embarking upon the substantive arguments of this research, it is worthwhile to be explicit about the merits of what is being proposed. Essentially, this paper is premised upon a belief that an empirical study of the phenomenon of dissent is valuable both inherently and as a means of rendering more readily apparent conceptual complexities which are often masked by a simplistic approach to the classification of judicial opinions.

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<sup>4</sup> The wider practical significance and importance of dissent upon legal process and principle will be examined in a forthcoming paper entitled ‘Dissent: A Conceptual Framework for Understanding Judicial Disagreement in the High Court of Australia’.

That the amount of empirical work performed in Australia has been relatively sparse<sup>5</sup> is surprising when one considers the importance attributed to it in overseas jurisdictions.<sup>6</sup> The lack of any Australian work directly concerned with

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- 5 But for significant examples, see AR Blackshield, 'Quantitative Analysis: The High Court of Australia, 1964–1969' (1972) 3 *Lawasia* 1; AR Blackshield, 'X/Y/Z/N Scales: The High Court of Australia, 1972–1976' in Roman Tomasic (ed), *Understanding Lawyers — Perspectives on the Legal Profession in Australia* (1978). In recent years there has been more activity on this front, chiefly by Russell Smyth: Russell Smyth, 'Academic writing and the courts : a quantitative study of the influence of legal and non-legal periodicals in the High Court' (1998) 17 *U Tas LR* 164; Russell Smyth, '“Some are More Equal than Others” — An Empirical Investigation Into the Voting Behaviour of the Mason Court' (1999) 6 *Canberra LR* 193; Russell Smyth, 'Other than “accepted sources of law”? A quantitative study of secondary source citations in the High Court' (1999) 22 *UNSWLJ* 19; Russell Smyth, 'What do judges cite? An empirical study of the “Authority of Authority” in the Supreme Court of Victoria' (1999) 25 *Mon LR* 29; Russell Smyth, 'What do intermediate appellate courts cite? A quantitative study of the citation practice of Australian state supreme courts' (1999) 21 *Adel LR* 51; Russell Smyth, 'Law or economics? An empirical investigation into the influence of economics on Australian courts' (2000) 28 *ABLR* 5; Russell Smyth, 'Who gets cited? An empirical study of judicial prestige in the High Court' (2000) 21 *UQLJ* 7; Russell Smyth, 'The authority of secondary authority : a quantitative study of secondary source citations in the Federal Court' (2001) 9 *GLR* 25; Russell Smyth, 'Judicial prestige : a citation analysis of Federal Court judges' (2001) 6 *Deakin LR* 120; Russell Smyth, 'Citation of judicial and academic authority in the Supreme Court of Western Australia' (2001) 30 *UWALR* 1; Russell Smyth, 'Judicial Interaction on the Latham Court: A Quantitative Study of Voting patterns on the High Court 1935–1950' (2001) 47 *Australian Journal of Politics and History* 330; and Russell Smyth, 'Explaining Voting Patterns on the Latham High Court 1935–50' (2002) 26 *MULR* 88. See also Richard Haigh, '“It is Trite and Ancient Law”: The High Court and the Use of the Obvious' (2000) 28 *Fed LR* 87; Patrick Keyzer, 'The Americanness of the Australian Constitution: The Influence of American Constitutional Jurisprudence on Australian Constitutional Jurisprudence: 1988 to 1994' (2000) 19 *Australasian Journal of American Studies* 25; and Paul E von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901–1987' (1992) 14 *Adel LR* 181.
- 6 There is a wealth of recent American literature on the topic of judicial voting alone — for examples, see Paul H Edelman & Jim Chen, 'The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics' (1996) 70 *Southern California LR* 63; Harold J Spaeth & Jeffrey A Segal, *Majority Rule or Minority Will : Adherence to Precedent on the US Supreme Court* (1999); Evan H Caminker, 'Sincere and Strategic Voting Norms on Multimember Courts' (1999) 97 *Michigan LR* 2297; Youngsik Lim, 'An Empirical Analysis of Supreme Court Justices' Decision making' (2000) 29 *Journal of Legal Studies* 721. Recent Canadian publications include Peter McCormick, 'Birds of a Feather: Alliances and Influences on the Lamer Court 1990–1997' (1998) 36 *Osgoode Hall LJ* 339; Peter McCormick, 'Follow the Leader: Judicial Power and Judicial Leadership on the Laskin Court, 1973–1984' (1998) 24 *Queen's LJ* 237; Peter McCormick, 'The Most Dangerous Justice: Measuring Judicial Power on the Lamer Court, 1991–1997' (1999) 22 *Dalhousie LJ* 93; and Peter McCormick, 'Second Thoughts: Supreme Court Citation of Dissents & Separate Concurrences, 1949–1999' (2002) 81 *Canadian Bar Review* 369.

dissent<sup>7</sup> may very well be attributable to uncertainty as to the methodology which should be employed in order to produce the most reliable results. Although statistics are occasionally quoted in respect of a few justices,<sup>8</sup> it is clear that for the High Court as a whole this question has largely been left to impression and anecdote. For those few figures which have appeared there has been only a very limited attempt to explain the methodology by which they were ascertained.<sup>9</sup> The concern exists not so much with the figures themselves (which are largely confirmed by a rough attempt at calculation), but with questions as to how certain types of cases were handled by the researcher in arriving at them. How the

7 Implicit measurement of dissent underlies the most well known of Australian jurimetric studies. Blackshield's use of scalograms to illuminate 'those elements in judicial decision-making which are subjective, nonrational, and stubbornly value-charged' requires 'as an irreducible minimum requirement, [that] there must be *some* regular pattern of institutional dissent': Blackshield, 'Quantitative Analysis: The High Court of Australia, 1964–1969', above n5 at 5–6. In constructing his scalograms, Blackshield analyses cases, separating positive votes from negative ones in respect of particular values. In doing so, he acknowledges that classification as one or the other does not determine status as dissenting: at 15. Blackshield necessarily tallies dissenting votes made in the period he is studying but as this is a means to a different end it is perhaps unsurprising there is no explicit discussion of how he engaged in this preliminary step and the choices he made in response to the scenarios under discussion in the remainder of this paper. In footnotes 9–12 of the article under discussion, Blackshield gives statistics for the percentage of cases across eras in the High Court's history which feature 'divisions of opinion' or 'split decisions' — it is not entirely clear whether this means simply non-unanimity or disagreement as to final outcome, that is, the essential difference between concurrence and dissent which will be discussed in Part 3 here. Different attention is given to dissent by Smyth in his studies of voting behaviour of the Mason Court when he explains why concurring and dissenting judgments should be treated similarly for the purposes of his examination of coalition blocs. See for example Smyth, "Some are More Equal than Others" — An Empirical Investigation Into the Voting Behaviour of the Mason Court', above n5 at 197–198.

8 The author is aware of statistics proclaimed in respect of only four High Court justices. Blackshield calculated the rate of Murphy J's dissenting as 137 times in 632 cases (21.6%); see AR Blackshield, David Brown, Michael Coper & Richard Krever (eds), *The Judgments of Justice Lionel Murphy* (1986) at xvii–xix. In respect of Dawson J, Saunders performed a 'quick and inevitably rough count of reported constitutional decisions between 1982 and 1997 which came to a little over one hundred. In half of these the Court, including Dawson J, was in broad agreement. In another thirty or so, Dawson J was with the majority. He was in dissent in only about twenty constitutional cases over a period of fifteen years': Cheryl Saunders, 'Oration: Sir Daryl Dawson' (1998) 20 *Adel LR* 1 at 3. More recently Kirby J has given statistical support for his own notable propensity to dissent (32% of opinions), at which time he also cited McHugh J for comparative value (15%): Justice Michael Kirby, 'Law at Century's End: A Millennial View from the High Court of Australia' (2001) 1 *Macquarie LJ* 5 at 13.

9 In respect of Murphy J's rate of dissent, Blackshield provided related statistics gained from his tallying of Murphy's judgments, but it has to be conceded that there is only a brief indication as to how he resolved difficult choices in the classification of some of Murphy J's opinions (in light of the considerations raised in this paper). The High Court administration has provided Kirby J with his most recent statistics but this information is not made available outside the Court and a request for it by this author was denied. The lacunae of any basic statistical information about the High Court of Australia is remarkable when one considers the earnestness with which such information is compiled (and the ease with which it may be accessed) in respect of the Supreme Courts of the United States and Canada. The *Harvard Law Review* annually publishes statistics on the most recent term of the United States Supreme Court, while such information is provided online by the Supreme Court of Canada itself: <<http://www.scc-sc.gc.ca/information/statistics>>.

empirical researcher resolves the numerous choices she or he faces in tallying dissent must have some impact upon the results reached. If we are to seriously examine dissent, then some kind of empirical survey of its prevalence across the High Court's history would seem a necessary part of any such study. But it is crucial that the compilation of statistics on dissent occurs by means of a transparent and defensible methodology which is sufficiently explained so as to enable replication by others.<sup>10</sup> This should also ensure accuracy and consensus in the citation of such statistics.<sup>11</sup> This paper aims to settle some of the ambiguities surrounding our understanding of dissent in order to prepare the way for such research. It does so, with full awareness of the limitations inherent in empirical work and with an appreciation of the need for it to exist in relation to, and be supported by, more qualitative analysis.

Even for those with no interest in basic empirical studies of this sort, the demands involved in determining a methodology have a value beyond the eventual gathering of data. Specifically, the avoidance of lax application of terminology and a keener awareness of the boundaries on traditional concepts of dissent and concurrence assists in stimulating a deeper appreciation of the nature, forms and range of disagreement on the Bench. The complexity of the cases before the High Court means that in many instances a simplistic approach will inhibit our understanding of dissension and its role within the judicial method generally. Consideration of how one is to treat these cases in a statistical study invites reflection upon the basic tools and labels our legal system employs to convey a lack of judicial consensus. So, while the results of an empirical study may not arouse much enthusiasm amongst the sizeable portion of legal scholars who maintain an aversion to such things, I would suggest that the process of determining how to go about gathering such data — with its inevitable questions as to definition and classification — presents opportunities for debate about common legal phenomena of general relevance.

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10 'Good empirical work adheres to the replication standard: another researcher should be able to understand, evaluate, build on, and reproduce the research without any additional information from the author. This rule does not actually require anyone to replicate the results of an article or book; it only requires that researchers provide information — in the article or book or in some other publicly available or accessible form — sufficient to replicate the results in principle': Epstein & King, above n1 at 38.

11 As an example Kirby J has made reference to the Murphy J figures on earlier occasions where he more accurately described the latter's dissent rate as 'nearly 22%' (Justice Michael Kirby, 'Lionel Murphy and the Power of Ideas' (1993) 16 *Alt LJ* 253) but his most recent reference states that, '[o]f the approximately 600 opinions which [Murphy] wrote whilst a Justice of the Court, 137 were in dissent. This constitutes 23% of the total': Kirby, above n8 at 13. Compare Blackshield, above n8 claiming a dissent rate for Murphy J of 21.6%.

### 3. *Fundamental Concepts — Preliminary Classifications*

#### A. *Forms of Disagreement — Dissent and Concurrence*

Given the multiplicity of legal issues that arise in litigation before superior courts, it is rare to find complete accord between judges. There are two forms which judicial disagreement may take — dissent or concurrence. Of these, the concurring judgment is in theory the less pronounced, signifying as it does a concurrence in the orders given by a majority of the bench but for reasons not necessarily shared by any judge but the author of the judgment. Thus the disagreement is to the means by which the orders are arrived at, but not as to the orders themselves. However, a dissenting judgment is one delivered by a Justice who opposes the orders (and by implication, one may presume, the reasoning) favoured by a majority of the Court. A contrary conclusion as to the resolution of the matter distinguishes dissent from mere concurrence.<sup>12</sup>

Simple enough as that seems, there is a real tendency in much of the Australian literature concerned with judicial work to use these terms inappropriately. In particular, any difference of opinion is often labelled as dissenting. The authors of headnotes seem more culpable in this regard than others — and their influence is strong upon the legal community, particularly students. One often hears it said that a member of the judiciary has ‘dissented on that issue’ even when the judge concurs in the orders made by the court as an institution. An example of this all too frequent occurrence is found in the headnote preceding the report of *Bellino v Australian Broadcasting Corporation*<sup>13</sup> which describes Gaudron J as dissenting in respect of her opinion on two aspects of the case. This is despite the fact that

12 See John Alder, ‘Dissents in Courts of Last Resort: Tragic Choices?’ (2000) 20 *Oxford Journal of Legal Studies* 221 at 240; Michael Coper, ‘Concurring judgments’ in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) at 129–130; Ijaz Hussain, *Dissenting and Separate Opinions at the World Court* (1984) at 8; Donald E Lively, *Foreshadows of the Law: Supreme Court Dissents and Constitutional Development* (1992) at xx; Andrew Lynch, ‘Dissenting Judgments’ in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) at 216–218; Peter McCormick, ‘The Most Dangerous Justice: Measuring Judicial Power on the Lamer Court, 1991–1997’, above n6 at 102–103. A possible question mark over this definition arises from a statement by Justice Claire L’Heureux-Dubé in her recent paper, ‘The Dissenting Opinion: Voice of the Future?’ (2000) 38 *Osgoode Hall LJ* 495. In note 2, L’Heureux-Dubé says, a ‘dissent may relate either to the result arrived at by the majority in applying the law, or to the principles of law on which that result is based’. Whilst this seems to suggest that disagreement as to reasoning divorced from outcome amounts to a dissent, it is clear from subsequent passages that L’Heureux-Dubé is not proposing a redefinition of dissent which encompasses what other commentators identify as concurrence. Rather, she is simply suggesting that the disagreement as to result may arise from matters of application of accepted rules as well as the content of fundamental principles. In either case, it is submitted, there must be disagreement on the result in order for the judgment to qualify as a dissent. Instances in L’Heureux-Dubé’s paper which indicate that this statement is not to be seen as a rejection by her of the traditional distinction between concurring and dissenting judgments include notes 2, 28, 32 and 63. It is interesting, in fact, that unlike all other commentators, L’Heureux-Dubé gives no real attention to defining concurrence and explaining its relationship to dissent.

13 (1996) 185 CLR 183.



Gaudron J concurs entirely in the orders made by Dawson, McHugh and Gummow JJ — leaving Brennan CJ as the only truly dissenting judge. The lack of rigour with which the term ‘dissenting’ is used in case report series and student texts accounts for much of the cloudy thinking in this area and the imprecision in demarcating concurring from dissenting judgments.<sup>14</sup>

### **B. The Harvard Rules**

Although such rigid application of these terms is rarely insisted upon in an Australian context, consideration of the practices of the United States Supreme Court demonstrates how judicial opinions are subjected to much clearer classification in that jurisdiction. While Australia has followed the seriatim tradition of most English Courts,<sup>15</sup> the United States Supreme Court has opted for what Bader Ginsburg J calls the ‘middle way’:

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14 Some of my colleagues have expressed reservations about the degree to which this traditional distinction should be insisted upon in the Australian context, suggesting that these definitions are not applicable. There are three responses to this: (i) how else is dissent to be distinguished from concurrence; (ii) I am unaware of any commentary — Australian, American or English — which does not adopt outcomes as the basis upon which this distinction is drawn; and (iii) it is clear that the distinction is not just logical and undisputed, but that it is one to which significance is attached by the High Court itself. In *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314, Mason CJ, Wilson, Dawson and Toohey JJ stated that ‘it would not be proper to seek to extract a binding authority from an opinion expressed in a dissenting judgment ... That is not to say, however, that a dissenting judgment may not deserve respectful consideration.’ MacAdam and Pyke clarify this by saying that, ‘it is an entirely proper part of the judicial process for authoritative propositions of law to be extracted out of a combination of majority and minority judgments as long as such propositions are not in conflict with the majority ratio and/or the result in the case’: Alistair MacAdam & John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998) at 210. Clearly, the status of a judgment as dissenting may be seen to hold consequences for its future use. As such, it is not surprising to find that it is a distinction appreciated by — and insisted upon — by present members of the High Court: see Kirby J’s recent emphasis upon the difference between concurrence and dissent in the context of confusion surrounding his judgment in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395: Kirby, above n8 at 13.

15 On the practice of the English courts, see particularly Alder, above n12 at 233–237. The notable exception was the Judicial Committee of the Privy Council which adopted a strict practice of delivering only unanimous opinions in its role as adviser to the sovereign. This also had advantages in preventing tensions within the Empire: see Alder, above n12 at 235–236. A somewhat dated, yet nevertheless ambitiously comprehensive, attempt to describe the opinion delivery practices of many of the world’s courts is found in Kurt H Nadelmann, ‘The Judicial Dissent: Publication v Secrecy’ (1959) 8 *American Journal of Comparative Law* 415.

[There are] three patterns of appellate judgments by collegial courts: seriatim opinions by each member of the bench, which is the British tradition; a single anonymous judgment with no dissent made public, which is the civil law prototype; and the middle way familiar in the United States — generally an opinion for the court, from which individual judges sometimes disassociate themselves in varying degrees.<sup>16</sup>

The delivery of an opinion ‘for the Court’ means that identification of concurring and dissenting judgments is a much simpler task. The process of assigning a judge the responsibility to write for his or her colleagues fosters consensus rather than individualism and actively seeks to build a majority. Occasionally, this may not occur and there will be no majority voice speaking for the Court — instead the orders will be determined by plurality opinions.<sup>17</sup> But in most cases, an opinion is delivered ‘for the Court’ and attracts a majority of judges, leaving only two clear options remaining to a Justice who does not agree with the opinion penned by his or her colleague. He or she may write a separate, concurring opinion or a dissent. The use of the word ‘separate’ — not a label applied in any formal sense in courts operating in the seriatim tradition where the majority view often may have to be assembled by the reader<sup>18</sup> — says a lot about this method. Quite literally, a concurrence or dissent is ‘separate’ because it represents a breaking away — what Bader Ginsburg called a disassociation by varying degrees — from the central judgment which represents the views of a majority of judges.

The practice of an opinion written by a member of the Supreme Court and given ‘for the Court’ may be contrasted with the giving of judgments *per curiam* — a judgment given ‘by the Court’ without identification of individual author<sup>19</sup> — a method which was relatively popular before the advent of Chief Justice Marshall in 1801.<sup>20</sup> Even where there are no separate judgments, it is not the norm for the opinion of the United States Supreme Court to be delivered *per curiam* instead of having one judge write the opinion for the court.<sup>21</sup> However, the practice of *per*

16 Justice Ruth Bader Ginsburg, ‘Remarks on Writing Separately’ (1990) 65 *Washington LR* 133 at 134. The historical development by the Supreme Court of this ‘middle way’ is described at length in one of the clearest statements on the institutional and individual management of American judicial disagreement: see John P Kelsh, ‘The Opinion Delivery Practices of the United States Supreme Court 1790–1945’ (1999) 77 *Washington University LQ* 137.

17 L’Heureux-Dubé explains the concept of a ‘plurality’ decision as ‘the opinion supported by the greatest number of judges’ which although not a clear majority of the court, nevertheless holds more sway in the result reached than any other opinion given voice: see n12 at 496. This is, of course, how the ratio of a case is determined in courts using seriatim judgments when there is not a clear majority on the law. The reasons attracting most support amongst those proffered by the majority judges will be the most authoritative so far as the case’s future value is concerned. The term ‘plurality’ is not generally used to describe this situation occurring within the seriatim tradition as it does not represent a departure from any practice of an opinion being written for a clear majority of the Court by any single judge.

18 Though see Michael Coper, ‘Joint judgments and separate judgments’ in Blackshield et al, above n12 at 367–369.

19 WM Wiecek, ‘Per Curiam’ in K Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (1992) at 631.

20 Kelsh, above n16 at 140.

curiam opinions has been maintained by the Supreme Court — indeed it has accelerated somewhat in recent years.<sup>22</sup> In courts which follow the seriatim tradition, including the High Court of Australia, the per curiam opinion is the regular method by which a unanimous bench delivers its judgment.

The statistics compiled annually on the United States Supreme Court by the editors of the *Harvard Law Review* illustrate the relative ease with which judgments are categorised once a majority opinion written ‘for the Court’ by one Justice has been delivered. In particular, the *Harvard Law Review* pursues a methodology based upon these propositions:

- (a) A concurrence or dissent is recorded as a written opinion whenever a reason, however brief, is given.
- (b) A Justice is considered to have dissented when he or she voted to dispose of the case in any manner different from that of the majority of the Court. Thus for example, votes to reverse in a decision affirming by an equally divided Court are not counted as dissenting votes.
- (c) Plurality opinions that announce the judgment of the Court are counted as opinions of the Court.
- (d) Opinions concurring in part and dissenting in part are counted as dissents.<sup>23</sup>

As shall be seen in the next section, these rules may not be as simply applied to the High Court of Australia’s seriatim practices. Even so, it is argued that the strictness with which definitions of concurrence and dissent are insisted upon in the United States context means that the *Harvard* rules are an appropriate point of departure in designing a possible framework for performing similar empirical work in the Australian jurisdiction. Despite the differences between the seriatim practice and the American ‘middle way’ the two systems share a common view of what renders a judgment dissenting — disagreement as to orders, not simply an individual expression of reasons. That the Americans can collect statistical information consistently with the conceptual definition of dissent should at least prompt Australian researchers to attempt the same — and if the difficulties in translating and adapting the methodology to local circumstances prove to be insurmountable then we should be able to explain why this is so.

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21 A famous example is the case of *Brown v Board of Education* 347 US 483 (1954) where the opinion of the Supreme Court was written and delivered by Warren CJ on behalf of all Justices of the Court. Conversely, it should be noted that a per curiam opinion in the Supreme Court need not be unanimous but can be used in respect of an opinion of the Court so as not to reveal authorship. In such instances, the presence of concurring and dissenting judgments does not alter the majority opinion’s status as being ‘by the Court’: see Wiecek, above n19.

22 Kelsh, above n16 at 161.

23 This method of tallying is set forth in each presentation of statistics in the *Harvard Law Review* since 1949. For those wanting a direct quote, see, for example, (1988) 102 *Harv LR* 143 at 350. The subsequent reference in this paper to these criteria as rules (a), (b), (c) and (d) is my terminology not that of the *Harvard Law Review*.

### C. *Applying the Harvard Rules to the High Court of Australia — Some Necessary Modifications*

As stated above, reflection on what, for ease of reference, I shall call the ‘*Harvard rules*’ is fruitful in considering measurement of dissent in other jurisdictions. In addition to the fact that those rules have formed the basis of an ongoing exercise in data collection for over 50 years, they are premised upon a conceptual understanding which is applicable to our own approach to judgments. Obviously though, in light of some of the comments already made, there are differences in the practices adopted by the United States Supreme Court and the High Court of Australia which may impact upon the usefulness of the *Harvard rules* in respect of the latter institution. Thus, the adaptability and workability of the rules in the Australian context requires elaboration before proceeding further.

Firstly, in respect of rule (a), it is interesting to note the threshold which a judgment must meet in order to qualify for tallying as a concurrence or dissent. It is not the delivery of a separate opinion *per se* — but only when, in doing so, the Justice attaches reasons.<sup>24</sup> Thus, seemingly, a mere statement of agreement without anything more will not be registered as a concurrence.<sup>25</sup> Presumably it is seen as best to simply regard such a statement from a Justice as warranting his or her inclusion in the majority. Indeed, in empirical work concerned with the identification of coalition voting blocs this is exactly how such judgments are treated — as if the judge in question was in fact an author of a joint judgment with those with which he or she is in such complete agreement.<sup>26</sup> However, this acceptable fiction should not be taken too far and unless it is necessary or useful to the type of study being undertaken, may not need to be employed at all. Coper has recently said, ‘Sometimes (and particularly in *ex tempore* judgments) a concurring judgment is as brief as ‘I agree’. This kind of concurring judgment is no different in substance from being a party to a joint judgment, although care must

24 This practice is more fully explained at (1968) 82 *Harv LR* 63 at 302: ‘... whenever a Justice notes separately the manner in which he would have disposed of the case and gives a reason, however brief, for such disposition, he is credited with having written a concurring or dissenting opinion, as well as having cast a concurring or dissenting vote’.

25 The status of a bald statement of agreement may seem a problem of limited interest to us given the rarity with which concurrence is expressed with such brevity by members of the modern High Court. But this was a reasonably frequent occurrence in the Courts’ first few decades of operation. In several cases from the early years of the Court, Barton and O’Connor JJ offer a statement of concurrence without adding anything further (see, for example, *Murray v Collector of Customs* (1903) 1 CLR 25; *Mountney v Smith* (1903) 1 CLR 146). Additionally, there are cases wherein Barton and O’Connor JJ join with Griffith CJ so that one statement of reasons is given by the Court, clearly constituting a unanimous judgment. In respect of these decisions, it is interesting to note that the opinion, rather than being reported as being delivered *per curiam*, is often prefaced with the words: ‘the judgment of the Court was delivered by Griffith CJ’ (see, for example, *Hannah v Dalgarno* (1903) 1 CLR 1; *D’emden v Pedder* (1903) 1 CLR 91. Despite appearances, this probably owes little to an attempt by the original High Court to adopt the American ‘middle way’ and much more simply to the practice at the time of reading the judgments aloud as a means of delivering them.

26 See Smyth, ‘Judicial Interaction on the Latham Court: A Quantitative Study of Voting patterns on the High Court 1935–1950’, above n5 at 333; Smyth, ‘Explaining Voting Patterns on the Latham High Court 1935–50’, above n5 at 101.

be taken to leave no doubt about what it is with which the Justice agrees'.<sup>27</sup> Matters of substance duly acknowledged, it is clear that as a matter of procedure what has been delivered is still best regarded as a separate, concurring judgment.<sup>28</sup>

Turning to rule (b), it can be seen that it assumes the existence of a clearly identifiable majority of the Court which has stated a particular resolution of the dispute before it. This reflects just how integral the concept of majority is to our understanding of dissent. Of course, this rarely poses practical problems when examining the United States Supreme Court due to use of the American 'middle way' as the predominant method of judgment delivery. However, identification of a majority can be a less certain exercise in respect of a court which issues opinions in *seriatim*. Not only does the Court as an institution not have a judgment written for it — there is the increased likelihood that there may not even be a majority of Justices in favour of one result.

While the phrase 'majority of the Court' seems simple enough — it does in fact open up the possibility of much confusion. The example accompanying rule (b) demonstrates one aspect of this: in a court which is evenly split with respect to the orders to be made, then, regardless of what process or rule is adopted to settle the resolution of the matter, the absence of an *actual* majority in favour of the orders finally given prevents the votes against them from being classed as dissenting. More common than instances of an even split, are cases where there is a multiplicity of voices — not simply in the giving of diverse reasons for an agreed upon result, but rather as to the result itself. In such instances, identifying the orders favoured by a fixed majority of the Court is impossible.

In the United States Supreme Court, cases which produce no clear majority but a profusion of differing judgments are referred to as 'plurality decisions' and represent a regrettable departure from its normal practice. However, it still manages to attribute an opinion as being 'for the Court' despite the absence of a

<sup>27</sup> Coper, above n12 at 130.

<sup>28</sup> Consideration of these types of concurrences encourages reflection upon what we require of unanimity as a concept. May the label 'unanimous' only be properly applied in respect of a single judgment delivered by all members of the court, or does a total agreement in substance, albeit expressed through separate judgments, amount to the same thing? Certainly, the latter is a unanimous decision despite the absence of a unanimous judgment. The *Harvard Law Review* has this to say in respect of the methodology used to compile statistics on unanimity for the United States Supreme Court: 'A decision is considered unanimous only when all Justices hearing the case voted to concur in the Court's opinion as well as its judgment. When one or more Justices concurred in the result but not in the opinion, the case is not considered unanimous': (1988) 102 *Harv LR* 143 at 352 (notes accompanying Table I(C)). Obviously, on the *Harvard* understanding of what constitutes concurrence, separate statements of agreement with a lead judgment do not deny the existence of technical, as well as practical, unanimity. While there would seem to be little objection to adoption of a similar approach in Australia, and in respect of studies such as Smyth's (above n26) it seems necessary, in other contexts it would seem valuable to recognise such concurrences for what they are. A slightly flippant example is Easterbrook's search for the most insignificant United States Supreme Court Justice ever, wherein he includes in his tallies of the number of written opinions by each judge the delivery of 'two-word opinions', for example, 'I concur': Frank H Easterbrook, 'The Most Insignificant Justice: Further Evidence' (1983) 50 *UChiLR* 481 at 498.

clear majority.<sup>29</sup> This enables the relevant opinion writer to still be included in any tallying of authorship of opinions by means of rule (c) of the *Harvard* scheme. No such device is available in the Australian context due to the general use of the seriatim practice. What the Americans call 'plurality decisions' are in fact all too common in the High Court of Australia. The lack of a clear majority is an accepted incidence of our judicial method — there are no rules employed to attribute or create consensus that is not actually there. Rather, the final orders will reflect varying points of consensus amongst the judgments, but not necessarily the orders totally favoured by any one Justice, let alone by a majority of the Bench. However, this does not mean that such decisions should be discounted from any attempt at empirical research — indeed the sheer preponderance of such decisions means that any Australian study which left them unconsidered would be seriously deficient.

It would be a mistake to use the absence of an easily identifiable majority as a censure on the finding of a dissent — in such cases, the Court as an institution still states a result, albeit reached by composite. Instead, to enable the noting of dissent without the assistance of a majority opinion 'for the Court' as a counterpoint, dissension in judicial bodies giving seriatim opinions should be classified as disagreement with the orders issued by the Court. This represents a subtle, but powerful, adaptation of the *Harvard* rules' requirement that dissent be disposal of a case 'in any manner different from that of the majority of the Court'. Acknowledging the trend towards plurality that is integral to the seriatim tradition, dissent is more usefully identified in our system as simply a resolution of the case which is in any manner different from the final orders issued by the Court. Indeed, this is demanded by our standard definition of dissent which places more emphasis upon the relationship between a dissenting judgment and the orders made by the court as an institution than the differences of opinion across the presiding judicial officers. It is the former which is determinative of the judgment's status, even though the latter is integral in its own turn in the creation of the institutional position.

It should be noted that, even whilst making this modification, an exception can still be argued for those cases resolved through application of a procedural rule or practice. Although in such instances, judgments may still be compared against the final orders issued by the institution, the complete lack of a relational dimension between the Justices themselves in the determination of those orders argues against tallying as dissents those opinions which are at odds with the result of the case.

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29 Whilst this enables a result to be stated, there is clear dissatisfaction with plurality decisions and debate within American jurisprudence as to how to regard such decisions and whether they have any clear worth: Ken Kimura, 'A Legitimacy Model for the Interpretation of Plurality Decisions' (1992) 77 *Cornell LR* 1593; Alan Thurmon, 'When the Court Divides: Reconsidering the Precedential value of Supreme Court Plurality Decisions' (1992) 42 *Duke LJ* 419. See also, I Kirman, 'Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions' (1995) 95 *Columbia LR* 2083. These attempts to understand what to make of an institution which speaks with multiple voices which has been necessitated by the Supreme Court's departure from its 'middle way' in recent decades are somewhat bemusing to those of us working in a jurisdiction which requires this kind of composite interpretation in order to analyse much of our caselaw.

This accords with the High Court's own preferred method of dealing with 'the difficulty of identifying what principle is established by a decision of an equally divided Court'.<sup>30</sup> While the Court is concerned with the authoritative weight to be ascribed to the opinions in those cases, it is significant that it acknowledges that the result is of no help in determining precedential value given the artificiality with which it is procured. As Gummow and Hayne JJ said in *Re Wakim*, 'the expedient prescribed by s23 of the *Judiciary Act* enables a decision to be given in the particular case but the application of that provision does not give to the opinion of those members of the Court who favoured that disposition of the matter any special status'.<sup>31</sup> For this reason, cases where the final orders of the Court are derived as a matter of procedural rule, as opposed to having been constructed through the points of agreement amongst the justices, should not be included for the purposes of calculating rates of dissent.

As already indicated, rule (c) of the *Harvard* scheme is inappropriate to the practices of the High Court of Australia. While one often hears a judgment described as 'leading', there is no need to ascribe a particular status to such a judgment even if it does represent the views of the greatest number of sitting Justices, albeit not a clear majority of the Court. However, given the comments made in respect of rule (b) above, it may be desirable to rewrite (c) in order to clarify what will *not* constitute dissent in the absence of a majority. Rule (c) could be recast as: opinions that concur in the orders of the Court, even if not belonging to any actual majority, are not dissenting.

Rule (d) when applied in a seriatim context also increases the possibility of registering more dissents than at first glance may seem accurate — or even feasible.<sup>32</sup> But whilst it has the potential to multiply the presence of serious disagreement in the form of dissent, there seems to be little argument against the adoption of such an approach. In fact, rule (d) is merely the logical consequence of rule (b) — the low threshold of dissent in (b) being a decision 'in any manner different' would seem to render rule (d) unnecessary as even a whiff of dissent will be enough to taint the whole opinion. This is also entirely consistent with the strict definitional stance I have taken earlier in this Part of the paper. As it serves merely as duplication, rule (d) may simply be abandoned.

To conclude, while there is sufficient conceptual commonality between the United States and Australian legal systems for the *Harvard* rules to provide a logical and helpful starting point for analysis of the High Court of Australia, some modification of those rules is clearly appropriate. In light of the preceding discussion, the method for Australian empirical study may be stated as comprising the following rules:

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30 *Re Wakim: Ex parte McNally* (1999) 198 CLR 511 at 571 (Gummow & Hayne JJ).

31 *Ibid.* Compare Kirby J at 598.

32 This impact is not exclusive to the seriatim practice — it also has this potential in respect of that percentage of United States Supreme Court cases which are resolved by plurality opinions.

- (a) A separate statement of opinion as to how a case should be resolved is recorded as a separate judgment (concurring or dissenting) regardless of whether reasons are given or not;
- (b) A Justice is considered to have dissented when he or she voted to dispose of the case in any manner different from the final orders issued by the Court. This rule will not apply in cases where the final orders are determined by application of a procedural rule (for example, resolution of deadlock between an even number of Justices through use of the Chief Justice's casting vote). The latter type of case should be discounted from any study attempting to quantify dissent.
- (c) Opinions that concur in the orders of the Court, even if not belonging to any actual majority, are not dissenting.

These revised rules aim to promote greater precision and clarity — chiefly through distancing dissent from the deceptively simple concepts of majority and minority which can prove elusive in respect of a court employing the seriatim method. It is apparent from the comments made so far that while the definition of dissent appears straightforward, it can, through application of the rules discussed above, still encounter unexpected problems in practice caused by the complexities inherent in collegiate decision-making in a court of last resort. It is time to consider these difficulties in much greater detail.

#### **4. *Connection to Notions of Majority and Minority — Dissent as a Relational Concept***

Dissent is a relational concept. A judgment is not naturally dissenting — it is only through its position within the context of the court's decision as a whole that its status is derived. I have said earlier in this paper that this relativity can be found in two senses. One of those, which has just been highlighted in the context of the definitional emphasis of dissent is between an individual judgment and the Court as an institution which delivers final orders. These orders are reached through the composite of the various individual judgments which are delivered by the Court's members. The connections and disparities between these judgments is the second sense by which it may be said that a judgment's status is determined by where it stands in relation to something external to it.



Of course, this is not to deny that in many instances, judges know they are in a minority and write the judgment couched in terms which indicate awareness that their views have not held the day.<sup>33</sup> But otherwise, there is little difference in form between a dissenting and concurring opinion. Justice Brennan of the United States Supreme Court said that 'where significant and deeply held disagreement exists, members of the Court have a responsibility to articulate it. This is why when I dissent, I always say why I am doing so. Simply to say, 'I dissent', will not do'.<sup>34</sup> Whilst this would seem to cast more onerous obligations upon the dissenting, rather than concurring, judge, in reality concurrence seems to produce just as much reflection and self-justification as dissent.<sup>35</sup> In any case, no firm observations can be made as to the length of a judgment and its function as concurring or dissenting, so idiosyncratic is judicial style. Many of today's concurring judgments match each other in breadth of scope and number of pages, rather than building upon the points of agreement between them.<sup>36</sup> Conversely, Murphy J's many dissents demonstrate his characteristic economy of expression. The point is simply that one might expect more voluminous statements of opinion from those judges choosing to reach a contrary result than from those who are adding their voices to the majority. In this regard, Kirby J certainly does not disappoint.

To recognise dissent as a relational concept is to establish that the study of it cannot rest upon the form of individual judgments nor the views and characteristics of their authors.<sup>37</sup> It is to acknowledge that a 'Great Dissenter' is not self-made. Rather, the shifting sea of majority and minority voting blocs which

33 See, for example, the closing sentiments of Barton J in *Duncan v State of Queensland* (1916) 22 CLR 556, recently quoted by Kirby J to conclude his dissent in *Re Wakim; Ex parte McNally*, above n30. Barth suggests that, 'Freed from the constraints entailed in trying to express the sense of a majority, [dissents] embody, at times, passages of great force, eloquence, and ardor': Alan Barth, *Prophets with Honor — Great Dissents and Great Dissenters in the Supreme Court* (1974) at xii. In this vein, Brennan J of the United States Supreme Court talked of 'dissents that soar with passion and ring with rhetoric ... that, at their best, straddle the worlds of literature and law': Justice WJ Brennan, 'In Defense of Dissents' (1986) 37 *Hastings LJ* 427 at 431. The Chief Justice of Australia has recently poured cold water on this kind of sentiment by saying that '[o]nly someone given to mock heroics, or lacking a sense of the ridiculous, could characterise differences of judicial opinion in terms of bravery': Chief Justice Murray Gleeson, *The Boyer Lectures — The Rule of Law and the Constitution* (2000) at 136.

34 Brennan, *id* at 435.

35 It was not always so. Mention has already been made of the fact that the early years of the High Court of Australia were marked by high levels of agreement which very often saw Barton and O'Connor JJ concur with Griffith CJ with only the briefest of judgments.

36 This tendency has been long lamented: see Michael Coper, 'Interpreting the Constitution: A Handbook for Judges and Commentators' in AR Blackshield (ed), *Legal Change — Essays in Honour of Julius Stone* (1983) at 62–63. Kirby J has also expressed dissatisfaction with the individualism of Australian judges: Justice Michael Kirby, 'What is it really like to be a Justice of the High Court?' (1997) 19 *Syd LR* 514 at 517. Justice Callinan has recently indicated that the Court is aware of these complaints and adopts strategies to attempt to consolidate consensus: Justice IDF Callinan, 'Law and literature' (2001) 21 *Australian Bar Review* 265. See also High Court of Australia, *Annual Report* (1998–99) at 5.

37 This point is made in a slightly different context by Primus when he attempts to explain why some dissents are influential upon later courts: Richard A Primus, 'Canon, Anti-Canon, and Judicial Dissent' (1998) 48 *Duke LJ* 243 at 264–270.

seems intrinsic to collegiate decision-making decides these reputations.<sup>38</sup> It is for this reason that, despite the complexities noted in the last section of this paper, it must be recognised that concepts of majority and minority are intimately bound up with any attempt to understand dissent — its nature and prevalence.

The relational nature of dissent is particularly easy to appreciate upon consideration of the reversal of fortune which some judges have experienced over the course of a long career. The position of Bora Laskin in the Supreme Court of Canada during the early years of his Chief Justiceship is but an example. The most junior justice on the Court at the time of his elevation by President Trudeau, Laskin regularly dissented against a strong conservative majority on his own court until subsequent appointments swung the balance of power in his favour.<sup>39</sup> In the High Court of Australia, the two longest serving Chief Justices suffered a less palatable fate — both Griffith and Barwick dominated their brethren in the early years of their tenure but as their influence slipped towards the end (admittedly much more towards the end in the case of Griffith rather than Barwick) they found themselves more regularly in the minority. Of course, the swing between majority and minority acceptance of ideas can take longer than the course of a judicial career. A

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38 Despite the reservations which some may have about empirical data on judicial behaviour, the ability of such studies to highlight voting coalitions seems an invaluable form of analysis to assist our understanding of how majorities are formed. For recent work on voting coalitions in the High Court see Smyth, '“Some are More Equal than Others” — An Empirical Investigation Into the Voting Behaviour of the Mason Court', above n5; Smyth, 'Judicial Interaction on the Latham Court: A Quantitative Study of Voting patterns on the High Court 1935–1950', above n5; Smyth, 'Explaining Voting Patterns on the Latham High Court 1935–50', above n5. This point is acknowledged by Stack in his consideration of dissent's relationship to the rule of law. In critiquing Dworkin's views on judicial work as set out in *Law's Empire*, Stack stresses the institutional elements of judging which determine dissent: 'Indeed, even when law as integrity is examined on its own terms, the theory is inadequate to provide a justification for the practice of dissent. The inability of law as integrity to justify this institutional practice results from Dworkin's use of an imaginary superhuman judge, Hercules, to explicate the kind of legal interpretation that law as integrity involves. Dworkin indicates that the interpretative demands of law as integrity bind judges individually, rather than binding an entire multimember court, but he develops his theory through Hercules in order to abstract away from the practical demands on actual judges, such as “the press of time and docket”, as well as incentives to compromise their positions in order to gain the votes of other judges. Distance from those practical issues may be necessary to articulate an account of judicial interpretation with the richness that Dworkin provides. But the failure to return from that abstraction has crucial consequences for consideration of the institutional elements of our legal practice. With Hercules neither an actual judge nor the embodiment of an entire court, law as integrity operates outside the institutions of legal practice; it fails to attend, as Frank Michelman points out, “to what seems the most universal and striking institutional characteristic of the appellate bench, its plurality,” and, accordingly, to the institutional practice of dissent. Dworkin's theory fails as an interpretation of legal practice insofar as it disregards the enduring institutional elements of our legal system.' Kevin M Stack, 'The Practice of Dissent in the Supreme Court' (1996) 105 *Yale LJ* 2235 at 2245.

39 'The critical change came when Justice Julien Chouinard replaced Judge Pratte in September, 1979. Judge Chouinard ... quickly became Judge Laskin's critical “fifth vote”': Peter McCormick, 'Philosophical debate changed court forever' *National Post* (Canada) (6 April 2000) at 12. See also, L'Heureux-Dubé, above n12 at 505.

judge who regularly delivers a minority opinion may no longer be serving by the time his or her views may start to attract majority approval.

Implicit in these observations is the idea that majorities and minorities are made on shifting ground — and in final courts, are subject to a variety of factors which may alter the balance over time. In this sense, the divide between majority and minority opinion, whilst determinative (and thus crucial) of the outcome of a particular dispute, acquires less significance in retrospect. If anything, a preponderance of concurring judgments exacerbates this feature as it indicates a majority achieved by composite.<sup>40</sup> This is not to suggest that the status of a judgment is irrelevant to its future use or disuse, but rather is merely to acknowledge the fluidity central to any consideration of the topic of dissent.

#### A. *The Degree of Concurrence*

The first observation that must be made is that while concurring judgments are, in theory, a less marked form of disagreement than those which dissent, in some circumstances this may not be the case. There may be more common ground between some of the majority judges and those in dissent, than exists amongst the concurrences which constitute the majority on the result.<sup>41</sup> Even in cases where there is no dissent, it must be appreciated that there are often notable divisions amongst the concurring judgments.<sup>42</sup> Thus, the definitional framework may be subject to criticism as being entirely outcome focused and ignoring the substance of disagreement which may exist between those Justices concurring in the result of the Court. In so far as ascertaining the role of contrary views in the development of legal principle, the actual result in the case where those views were espoused would seem of limited relevance to their subsequent adoption by a later court which is attracted by the reasoning itself. In which case, there may be something to be said for discarding the classifications of ‘dissenting’ and ‘concurring’ and

40 As *L’Heureux-Dubé*, above n12 at 514 (fn 63), has said of seriatim opinions, they ‘diminished the authority of judgments because it was impossible to determine the actual ratio approved by the majority, since each judge stated it differently ... [t]he difficulty it creates for lawyers and judges lies not in the fact that there are dissenting opinions, but rather in the fact that there are several opinions, agreeing in the result but not in the reasoning by which it is reached’.

41 A good example of this is found in the criminal law case of *Royall v The Queen* (1990) 172 CLR 378 wherein Toohey and Gaudron JJ dissent by indicating that they would have allowed the appeal dismissed by the other members of the Court. However, their judgment shares significant points of agreement with some members of the majority — Mason CJ and Deane and Dawson JJ — about the unsuitability of foreseeability as a test for causation in self-preservation cases. These views are pointedly not shared by the remaining members of the majority — Brennan and McHugh JJ, who favour the use of reasonable foreseeability in this context.

42 Two examples of this spring to mind. The first is the decision of the Court in *Jaensch v Coffey* (1984) 156 CLR 41 where Deane J, with the support of Gibbs CJ, launched his proximity requirement for establishing a duty of care. This met with immediate resistance from Brennan J, though his Honour concurred in the result. Of course, Brennan J’s rejection of proximity was sustained over many subsequent cases but it stems from *Jaensch v Coffey* — a fact which may be lost through an attempt to gauge disagreement looking only through the eyepiece of dissent. The second case is *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 where the Court agreed that s299(1)(d)(ii) of the *Industrial Relations Act* 1988 (Cth) was invalid but divided over the existence of the implied freedom of political communication.

simply focusing upon opinions which originate from a minority of the court before gaining wider acceptance by a majority. If one is trying to understand the long term influence of particular judgments which have challenged majority reasoning, does a strict insistence upon the conceptual divide between concurrence and dissent risk failing to illuminate the true nature and extent of disagreement on the Court?

To the compiler of statistical information on rates of dissent, any such study necessarily carries with it this not insignificant limitation.<sup>43</sup> To the researcher engaged in a more discursive analysis, the inflexibility of the core concepts may be suspended when confronted with 'a dissent in substance and concurrence in form'.<sup>44</sup> Donald E Lively's account of the significance of minority opinions in the development of American constitutional law is an extremely important publication in this area, but he makes it very clear that he will not be constrained by the traditional fixed categories of judicial disagreement when he says:

Two opinions discussed in subsequent chapters, Chief Justice Taney's in *Prigg v Pennsylvania* and Justice Brandeis' in *Whitney v California*, are styled as concurring opinions. Because the views they expressed were so profoundly divergent from the Court's, however, it is their dissenting spirit that is most notable. Whether responding to the Court's judgment or reasoning, a dissenting opinion establishes an alternative model of logic or understanding for future reference.<sup>45</sup>

Lively's willingness to forsake the rigid definitional differences between concurrence and dissent is not unattractive. As will be seen across the remainder of this paper, severe limitations — not to mention considerable confusion — can accrue from an insistence that a judge disagreeing with the court's final orders is in dissent. And, as already noted, a study confined to only those judgments which meet the technical definition of dissent, runs the danger of ignoring hugely significant opinions advanced by a small, albeit concurring, minority of the court.

However, there are a number of concerns which arise in respect of such an approach and it is significant, I would suggest, that these concerns apply just as equally in respect of studies of judicial disagreement which are not empirical in nature. First, while the standard definitions of dissent and concurrence can distort the reality of disagreement within the Court, their abandonment leaves nothing to fall back on but the subjective assessment of any one individual researcher. In many cases (and in respect of Lively's American study, the two referred to in the passage cited above are good examples), the identification of pronounced disagreement from the majority in a concurring opinion is a fairly straightforward

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43 While recently quoting statistics on dissent, Kirby J was keen to apply the caveat that such figures can be 'misleading': Kirby, above n8 at 13.

44 Lively, above n12 at xx–xxi.

45 Lively, above n12 at xxi. Lively is not alone in feeling justified to include a concurring judgment in a study which purports to be concerned with dissents. In the introduction to his book, Barth, above n33 at xii, admits that among the dissenting opinions is 'one brilliant and immensely influential concurring opinion by Justice Louis D. Brandeis, which is, in content, more a dissent than a concurrence ...'.

exercise and one upon which there should be a high degree of consensus. But it is not hard to imagine that in just as many, if not more, cases, there could well be vigorous debate as to the extent of disagreement represented by a concurring judgment. While this difficulty would apply to all studies of disagreement, an attempt at a comprehensive empirical study of dissent (which, to be clear, it should be stated Lively's is not) would be particularly weakened by such an approach as no two researchers could be sure of producing the same set of statistics from precisely the same material. So while a study of dissent which focuses upon only those opinions which meet its technical definition carries certain limitations, it must be more certain than one which involves the researcher divining for a 'dissenting spirit'.

The second objection to a relaxed attitude to classification of disagreement is probably best put in the context of authors other than Lively. A distinction may be drawn between his approach to the definitional boundaries and that of others working in the area. Both Lively and Barth<sup>46</sup> state the standard meanings of 'dissent' and 'concurrence' and then acknowledge breaking them in a few instances to include consideration of particular concurring judgments. Some other studies simply seek to set aside the definitions generally. Flanders,<sup>47</sup> Scalia<sup>48</sup> and Stack<sup>49</sup> all simply include concurring opinions within their use of the word 'dissent' for the purposes of their commentary.<sup>50</sup> Whilst this catches all forms of discord and acknowledges that many of the comments in respect of dissent are just as applicable to concurring judgments, it does so at the cost of overlooking significant instances where a justice in disagreement with his or her brethren quite deliberately exercises self-restraint to deliver a concurring opinion or conversely where a justice persists in the delivery of dissent on an issue recurring before the court. Once the division between concurrence and dissent is made fluid, the importance of these judicial choices becomes less notable. A good example of what is meant here is the concurring judgment of Dawson J in *Richardson v Forestry Commission*<sup>51</sup> which reiterates all his objections to the majority's interpretation of the external affairs power under the Commonwealth Constitution which had appeared in his dissent in *Tasmania v Commonwealth (The Tasmanian Dams Case)*.<sup>52</sup> The vigour with which Dawson J still held those views by the time of *Richardson* cannot be denied, but it is his decision to close the door on his own narrow reading of s51(xxix) and concur with the majority which makes his

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46 Above n33.

47 Robert G Flanders Jr, 'The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable' (1999) 4 *Roger Williams University LR* 401.

48 Antonin Scalia, 'The Dissenting Opinion' (1994) *Journal of Supreme Court History* 33.

49 Stack, above n38.

50 It should be noted in respect of all these authors, that they do not argue the distinction between concurring and dissenting judgments is fallacious. They do not attack the binary classification of separate judgments supported by the commentators cited above at n12, but simply choose to group concurring and dissenting together for the purposes of considering separate opinions and judicial disagreement.

51 (1988) 164 CLR 261.

52 (1983) 158 CLR 1.

judgment so interesting. A study which searches for 'dissenting spirit' at the expense of technical classification of judgments may miss these important nuances of when the line traditionally separating forms of judicial disagreement is crossed — in either direction.

Finally, and most crucially, it is patently clear that a general discarding of the line separating dissent from concurrence is untenable in a jurisdiction where seriatim opinions are delivered. The concurring judgment does not occupy some specific status rendering it readily distinct from a judgment which is published as the 'opinion of the Court'. A glance at the annual statistics compiled on the United States Supreme Court indicates the ease with which American commentators can categorise and quantify concurrences and dissents — and combine the figures if so desired.<sup>53</sup> As already discussed in Part 2, concurrence, in our context, lacks the quality of being a 'separate' opinion — it is not formally separate from anything. The status of judgments delivered by a court in seriatim lack the ability to be classified according to an obvious relationship to the central opinion delivered 'for the Court'. The inclusion of concurrences in our understanding of a dissenting judgment would have the effect of rendering almost all judgments delivered in the High Court's history as dissenting!

Given his prominence in this area, it is worth explaining why the methodology proposed here appears to differ from that adopted by Russell Smyth in his study of voting coalitions on the High Court. Smyth sets aside the status of judgments as dissenting or concurring on the basis that 'the reasons are more important than the outcome'.<sup>54</sup> This is certainly true for the purposes of Smyth's inquiry into instances of 'explicit agreement' through joint judgments. Smyth cites as support for his approach the *Harvard Law Review's* explanatory notes to its statistics on voting alignments on the United States Supreme Court:

Two Justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a Justice in the body of his or her own opinion. The table does not treat two Justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case and wrote separate opinions revealing very little philosophical disagreement.<sup>55</sup>

This passage indicates very clearly the context of the 'reasons are more important than the outcome' approach. In compiling statistics on voting coalitions,

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53 As an example see the statistics for the 1969 term: (1970) 84 *Harv LR* 1 at 251 (Table III(A)).

54 Smyth, 'Judicial Interaction on the Latham Court: A Quantitative Study of Voting patterns on the High Court 1935–1950', above n5 at 333; and Smyth, 'Explaining Voting Patterns on the Latham High Court 1935–50' above n5 at 99. Smyth expands upon this: 'If a Justice dissents from the outcome of the case it is clear that he or she is not part of the successful coalition that decided the case. However, it might be less obvious that a Justice who writes a separate judgment agreeing with the outcome, but not the reasons, of the other Justices should be treated the same. But this follows once it is accepted that the reasons are more important than the outcome ...'

55 (1996) 110 *Harv LR* 135 at 369 (notes accompanying Table I(B)).

one should not enter the risky realm of subjectively assessing concurrences for levels of agreement, but instead note only those instances where agreement is so 'explicit' as to be ascertainable with objectivity and certainty, that is, complete uniformity of reasons through joint authorship of an opinion. It is not that dissents and individual concurrences are much of a muchness in gauging disagreement, but rather the latter are relegated to the position of the former for the purpose of studies aiming to uncover only clear evidence of unassailable consensus.

While obviously appropriate and necessary in the context in which Smyth is working, for very similar reasons of ensuring the quality of the results produced, this is not a method which is transferable to a study aiming to discern levels of dissent — essentially explicit *disagreement*. Just as considering separate concurrences risks muddying the observable instances of judicial coalitions, treating concurrences as dissents on the basis of the level of disagreement found within their reasons will similarly involve the researcher in a subjective exercise. Even acknowledging the value of Smyth's exposure of voting coalitions on the High Court using this method which disregards separate concurrences, an inevitable limitation of his work is that there is undeniably more agreement than his figures reveal — it is just simply not 'explicit' enough.<sup>56</sup> Likewise, I have admitted that disagreement on the Court may be much more pronounced than rates of dissenting judgments alone will indicate. The nature of both exercises is that in order to be precise and objective they carry with them this limitation. So despite initial impressions, the treatment of concurrences proposed here is not at odds with Smyth's reported methodology in his numerous studies of judicial coalitions, but on the contrary is motivated by very similar concerns. Indeed, this is made apparent by the *Harvard Law Review's* employment of both these approaches with respect to concurring judgments depending upon whether it is seeking to produce data on voting alignments or dissent rates.

The weight of concurrence is one of several difficulties presented to those who are attempting some study of dissent — whether empirically based or not. The temptation to be flexible with the definitional constraints is understandable to anyone who has tried to track disagreement in courts of last resort. The problems identified in the next section of this paper — many of which, to a large extent the United States Supreme Court has managed to insulate itself from, and thus American commentators have not had to confront — will demonstrate further limitations as to the strict conceptual meanings of dissent and concurrence in practice.

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<sup>56</sup> Smyth himself implicitly acknowledges this point in the context of his most recent study when he says, 'in the majority of cases during the period in which Latham was Chief Justice, all of the Justices delivered separate judgments: therefore this study focuses on a by-product of High Court practice': 'Explaining Voting Patterns on the Latham High Court 1935–50', above n5 at 108.

### **B. Identification of a Majority — Orders, Reasons and Multiple Issues**

The problem of the odd concurrence which has a ‘dissenting spirit’ pales beside the very frequent difficulty of identifying who has dissented and who has not. To simply state that a dissent is a judgment which disagrees with the court’s order, in addition to the reasons given for reaching it, denies the real complexity caused by the permutations possible among a bench of seven when asked to consider more than one issue. The comments made earlier about the shifting nature of majority and minority opinion are particularly pertinent to this discussion. It also overlooks that even in response to one question, there are multiple and not necessarily inconsistent answers which may be given and which are not indicative of simple disagreement. This touches upon, but extends, the observations made in respect of the degree to which a judge concurs. An examination of caselaw will illuminate these concerns.

#### *(i) Shifting Majorities — The Problem of Many Dissenters*

The decision of *Dennis Hotels Pty Ltd v Victoria*<sup>57</sup> (hereinafter *Dennis Hotels*) is a well-known and effective example of the havoc which a shifting majority can play upon an attempt to identify dissenters. That case concerned the question of whether sections 19(1)(a) and (1)(b) of the *Licensing Act* 1958 (Vic) were invalid as imposing excise duty in contravention of section 90 of the Commonwealth Constitution, which renders the ability to raise such taxes an exclusive power of the federal parliament. Subsection (a) calculated the fee for purchase of a victualler’s licence by reference to purchases of liquor in a 12-month period preceding the time covered by the new licence (a ‘back-dated’ licence fee). Subsection (b) provided that the fee for a temporary licence was one pound per day plus six per cent of the purchase price paid for any liquor during the period of the temporary licence. Thus, the calculations under subsection (b) made no use of the ‘back-dating’ method. The Court was divided as to the validity of the two licences.

Chief Justice Dixon with McTiernan and Windeyer JJ found that both subsections attempted to raise an excise and thus were in breach of the constitutional constraint found in section 90 of the Constitution. On the other hand, Fullagar, Kitto and Taylor JJ saw nothing impermissible in either method of calculation and adjudged both provisions to be valid. The seventh vote was held by Menzies J who was of the view that the temporary licence was an excise (thus he formed a majority with Dixon CJ with McTiernan and Windeyer JJ in ruling section 19(1)(b) invalid), but he felt that the back-dating calculation used in section 19(1)(a) saved those fees from being characterised as an excise (thus he formed a majority with Fullagar, Kitto and Taylor JJ in ruling section 19(1)(a) to be valid). The result of the case was that subsection (1)(a) was valid whilst (1)(b) was not but only one justice of the Court was of this opinion. The only judge to concur in the order made by the court was Menzies J, whose deciding vote alone had determined it. Does this mean that the other six members of the Bench were in dissent? Certainly, it cannot be said that they concurred in the order made by the court —

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<sup>57</sup> (1960) 104 CLR 529.



they each, in respect of one of the subsections, submitted a contrary opinion as to the result. Under the traditional understanding of dissent — disagreement as to the orders made by the court, not just the reasoning used to get there — what we have is six dissents. This tends to challenge our normal association between dissenting and the minority. But because the latter concept (along with, obviously, that of the majority) does not stay constant within the scope of a single case it is possible for a majority of judges to be identified as dissenting from the final result delivered by the Court as an institution.<sup>58</sup>

(ii) *Shifting Majorities — The Problem of Institutional Coherence across Multiple Issues*

Two factors in the Australian system render the kind of result witnessed in *Dennis Hotels* a fairly familiar occurrence. The first is our practice of giving seriatim opinions which negatively impacts upon consensus building in the Court. In the history of their Supreme Courts, the United States and Canada have moved away from this tendency to individualistic expression which can foster greater fragmentation of the Court than is warranted given the extent of consensus which may actually exist.<sup>59</sup> This comment is not confined to dissenting judgments but applies perhaps even more forcibly in the context of concurring opinions. L'Heureux-Dubé has succinctly explained the dangers which can arise through a multiplicity of reasons for the result of a case:

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58 Even applying the unaltered *Harvard* rules to the result in *Dennis Hotels* does not displace the characterisation which I have given it here. Those rules were stated in text accompanying n23. Rule (b), it will be recalled, states that 'A Justice is considered to have dissented when he or she voted to dispose of the case in any manner different from the majority of the Court'. Rule (d) stated that 'Opinions concurring in part and dissenting in part are counted as dissents'. The combined effect of these rules is clearly to confirm my finding that the six judgments of Dixon CJ, McTiernan, Windeyer, Fullagar, Kitto and Taylor JJ all should be counted as dissents for the purpose of compiling statistics. It can hardly be suggested that there is any solid majority in *Dennis Hotels*. Rather, it is what the Americans describe as a 'plurality decision'. But applying rule (c) ('Plurality opinions that announce the judgment of the Court are counted as opinions of the Court'), the judgment of Menzies J would seem to be the only opinion eligible to be identified as that 'of the Court'. The partial agreement with it voiced by the other six members of the bench cannot avoid activating rule (d) and the same result is reached. The only other study of dissent which I have found to cover this issue is that of Mark A Kadzielski & Robert C Kunda, 'The Unmaking of Judicial Consensus in the 1930's: An Historical Analysis' (1983) 15 *University of West Los Angeles LR* 43. In support of the approach which I am advocating here, the authors say at 47: 'There is normally on a seven man court the possibility of zero, one, two, or three dissents from the decision of the court. In some cases, however, where more than one issue is involved in a case, less than four judges agree with the entire disposition of the case, even though each of the several subpoints is supported by a majority of the court. In cases like this more than three dissenting votes are included in the totals. Although this may be somewhat unrealistic, the totals do reflect the number of judges who, over the course of the year, deviated from the actual legal decisions which were produced by the courts considered as units.'

59 Though, as noted earlier, plurality has been on the rise in the United States since 1941: Kelsh, above n16 at 174–181.

It should also be noted that in Canada, as in England and the United States, there may be several individual opinions that are in mutual agreement or disagreement with one another. This may lead to a 'plurality' decision (the opinion supported by the greatest number of judges), accompanied by other opinions which may agree in the result, but not as to the method by which the result is reached. In such cases, there are no majority reasons *per se*. These type of decisions — now relatively rare in Canada — are a legitimate reason for criticism, as they tend to detract from the clarity and authority of the decision.<sup>60</sup>

Secondly, the problems caused by a tendency towards the giving of individual opinions rather than an 'opinion of the Court', are exacerbated in a climate where the Court is not called upon to answer a simple question but numerous complex and interrelated ones.<sup>61</sup> Increasingly this has been the High Court's lot. By the standard of recent times, the division with respect to the two licence schemes in *Dennis Hotels* was simply an unfortunate occurrence — these days the Court is regularly presented with so *much more* scope for disagreement rather than consensus. This was a trend identified fairly early on by Murphy J who lamented its capacity to be destructive of useful majority consensus. In his last case, that of *Miller v TCN Channel Nine Pty Ltd*<sup>62</sup> the High Court was asked to consider whether section 6 of the *Wireless Telegraphy Act 1905* (Cth), which prohibited the unauthorised establishment, erection, maintenance or use of a transmission station, was in any way inconsistent with two constitutional guarantees. The first guarantee argued by the defendant was that expressed in section 92 of the Commonwealth Constitution, while the second was a far more uncertain constitutionally implied freedom of communication. Although Murphy J concurred in the majority's finding that section 92 did not excuse the defendant's non-compliance with section 6 of the relevant Act by the establishment, erection and maintenance of a telegraph tower without authorisation, he was in a minority with Brennan J in holding that the entire section was unaffected by the express constitutional guarantee. As to the question of an implied freedom of speech, it is notorious that at this time Murphy

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60 L'Heureux-Dubé, above n12 at 496 (n2). This point has also been discussed by Bader Ginsburg, above n16 at 148. In this latter piece, Bader Ginsburg, at 148–149, also suggests that the increased individualism of Supreme Court justices 'may be attributed to the multiplication of law clerks' and 'more efficient means to retrieve and process words'.

61 In respect of the US Supreme Court, Bader Ginsburg has said that 'the near disappearance of easy cases — became evident in the 1940s, as the dissent rate moved to over sixty percent. Hard cases do not inevitably make bad law, but too often they produce multiple opinions.'; above n16 at 148. Only Alder, above n12 at 227–233, has undertaken work on the basis of disagreement in these hard cases arising in final courts of appeal by attempting to identify the faultlines over which such disagreements occur. In respect of the House of Lords, he identifies four kinds of 'incommensurable disagreement': (1) Disagreement about substantive ethical or political values; (2) Disagreement about judicial function, particularly the distinction between formal and substantive reasoning; (3) The search for a priori principles versus a process focused on consequences; and (4) Differences of emphasis or predictions of consequences or inferences from fact.

62 (1986) 161 CLR 556.

J was a lone voice in favour of this, despite many members of that court subsequently going on to develop just such a implication, culminating in its unanimous acceptance in the decision of *Lange v Australian Broadcasting Corporation*.<sup>63</sup> Justice Murphy appreciated that the way the Court handled a multiplicity of issues could lead to confusion about the basis for its result and his views are worth quoting at length:

Seeking the opinion of the Court by a stated case presenting separate questions causes a difficulty. For example, a majority of justices may answer No to each question, yet a majority may be of opinion either s.92 or an implied guarantee prevents the application of the sections to the defendant. The problem of framing the questions so that there is no possibility of a distorted result was agitated in the preliminary proceedings in *Uebergang v Australian Wheat Board*.<sup>64</sup>

An example of where the adoption of separate questions would have distorted the ultimate result is *Queensland v The Commonwealth*.<sup>65</sup> There, a majority was in favour of the view that if a previous decision was wrong it should not be followed and a different majority was in favour of the view that the previous decision was wrong. Had these questions been asked separately, and the logical result of those answers been treated as decisive, the previous decision would have been overturned even though a majority of the Court was in favour of adhering to the previous decision.

A civil or criminal appeal also provides a useful illustration of this point. If an appeal is made on two or more grounds, ordinarily the reasons of each justice are for or against allowance or dismissal of the appeal. If each ground of appeal was decided as a separate question, the appellant may not have a majority on either ground but a majority of the Court, for disparate reasons, may consider that the appeal should be allowed. As I understand it, the practice has been to refuse to poll the Court on separate issues. The Court bases its order on the whole of the issues. Here the real question is whether the defendant is entitled to protection either under s.92 or under an implied guarantee.<sup>66</sup>

Carrying his concern into effect, at the conclusion of his judgment, Murphy J declined to give an answer to the first question (challenging the relevant provisions of the *Wireless Telegraphy Act* using section 92) even though he clearly stated in his judgment that he was of the view that section 92 was inapplicable. His clear preference was for the defendant's matter to be stated as one question combining the possible bases of support, to which he indicated he would provide a positive answer.<sup>67</sup>

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63 (1997) 189 CLR 520.

64 (1980): <au/cases/cth/high\_ct/145clr266.html> (see Transcript of Proceedings 20 August 1979 at 15, 21–23; 6 February 1980 at 23–26).

65 (1977): </au/cases/cth/high\_ct/139clr585.html> (*The Second Territory Senators Case*).

66 Above n62 at 580.

These concerns have only been enlarged by the growing complexity of the Court's work. A good example of the distortion against which Murphy J warned in *Miller* is found in *Environmental Protection Authority v Caltex Refining Co Pty Ltd*.<sup>68</sup> In that case, the issue was essentially whether the privilege against self-incrimination applied to corporate persons, yet the High Court was faced with a series of related questions which had worked their way up from the New South Wales Land and Environment Court via that state's Court of Criminal Appeal.<sup>69</sup> A majority of the Court comprising Mason CJ and Brennan, Toohey and McHugh JJ found that corporations could not avail themselves of the privilege against self-incrimination and so gave a 'No' answer to this primary question. However, Brennan J departed from these other members of the Court in the responses he gave to some of the further questions asked. In particular, while Mason CJ and Toohey and McHugh JJ simply answered 'No' to the seventh question, ('Whether the privilege against self-incrimination extends to the respondent [Caltex] in respect of the said notice to produce?'), Brennan J responded, 'No, but the privilege against self-exposure to a penalty extends to Caltex'.<sup>70</sup> The effect of this was to create a different majority in which Brennan J was joined by Deane, Dawson and Gaudron JJ who were prepared to extend a privilege to Caltex in respect of the same notice to produce. But as these last three judges had dissented on the first question they based their answer to question seven on the application of the privilege against self-incrimination. Thus, the final answers of the Court were confusingly inconsistent. In answering question one, the Court denied corporations recourse to the privilege against self-incrimination, but the stated answer to question seven was that Caltex was 'entitled to either the privilege against self-incrimination or the privilege against self-exposure to a penalty' in respect of the notice to produce.<sup>71</sup>

*EPA v Caltex* gives a solid demonstration of the perils of multi-member courts — to which courts of final resort are particularly prone given their larger number of sitting members<sup>72</sup> and also their quite different position in respect of principles of precedent and the nature of disputed matters that reach them. The multiplicity of issues and questions for the Court's determination in final orders, combined with the variety of judicial personalities staffing the Court may well lead to a situation where the answers reached by the Court as an institution are logically inconsistent with each other.

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67 It is more than a little ironic therefore to find Murphy J reported in the headnote to the case as concurring in the majority opinion in respect of s92. While his opinion is largely with the majority on that issue (though as noted only he and Brennan J excluded s92 entirely from having any effect upon all provisions of the Act under challenge) his judgment makes it very clear that he declines to respond to the section 92 question. In effect he waives his vote on that issue and cannot be said to be part of a majority providing a negative answer to that question.

68 (1993) 178 CLR 477.

69 *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118.

70 Above n68 at 523.

71 *Id* at 560.

72 See Thurmon, above n29 at 426–427.

A slightly different example (and a more popularly cited one) of institutional incoherence is found in the case of *Hepples v FCT*.<sup>73</sup> Unlike in *EPA v Caltex*, the final orders in *Hepples* did not themselves betray the confusion which lay behind them. That case concerned the referral by the Administrative Appeals Tribunal of the question whether a particular sum of money was properly included in the assessable income of Hepples. The Federal Court had given a positive answer to this question, but the High Court found that in answering the referral two discrete questions about the applicability of two provisions arose. On neither the application of s160M(6) or s160M(7) of the *Income Tax Assessment Act* 1936 (Cth) as individual provisions was there a majority of judges prepared to find the sum to be assessable, yet there did exist an overall majority of the Court which found that the income was assessable upon application of one or the other of those subsections. The parties then made submissions as to the form of the orders (essentially, was the relevant income of Hepples to be assessed or not?) and the Court delivered a further written unanimous judgment in which it stated that the question asked of it by the AAT was 'ill-posed' and 'contains not a single discrete question of law but (at least) two questions of law'.<sup>74</sup> It warned against 'the aggregation of what are minority opinions on the two questions of law involved to make a majority opinion as to assessability'.<sup>75</sup> As a result, Hepples' income was not assessed.

The High Court's decision in *Hepples* is an example of the very thing which Murphy J was protesting in *Miller*, though the unanimous Court insisted on the distinction between determinations of issues of law and decisions on the rights and liabilities of litigants. Despite the impression that these would be heavily interrelated, the Court insists that 'an order on appeal must declare the majority opinion as to the issue of law, irrespective of any conclusion as to the ultimate rights of the parties to which the reasons of the respective Justices would lead'.<sup>76</sup> As MacAdam and Pyke point out, the consequences of this view 'appear to be that if the same issues in that case had come before the High Court by way of appeal from the final judgment, Hepples would have lost'.<sup>77</sup>

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<sup>73</sup> (1992) 173 CLR 492.

<sup>74</sup> *Id* at 552–553.

<sup>75</sup> *Id* at 552.

<sup>76</sup> *Id* at 551.

<sup>77</sup> MacAdam & Pyke, above n14 at 212. On this point, Coper says, 'It is interesting that the puzzle of how a question is framed, and whether it is consolidated or broken down, reflects the tension between the dual functions of the highest court in any judicial hierarchy. On the one hand, the role of the Court is to settle disputes between parties. From this perspective, the question must be whether the plaintiff or appellant wins or loses. On the other hand, it is also the function of the Court to state authoritatively the law for Australia. From this perspective, it is understandable that the Court is asked to pronounce upon abstract questions of law. But particularly when procedures are used such as demurrer, case stated, or questions reserved, the way in which those abstract questions are constructed (or deconstructed) can have a profound effect on how the ultimate question — who wins? — is answered.'; Michael Coper, 'Outcomes, effect of procedure on' in Blackshield et al, above n12 at 515. See also Hussain, above n12 at 269 (n23).

The problem of institutional coherence is probably more extreme and worrying than the other situations considered thus far. Whereas the shifting majority in *Dennis Hotels* presents the difficulty of an abundance of dissent, the orders of the Court as a whole are clear enough. Likewise, cases such as those referred to by L'Heureux-Dubé<sup>78</sup> where a majority is formed through similar votes, albeit for a variety of different reasons, provide no useful consensus of opinion but at least do not produce a distorted result whereby the Court's many internal voices effectively prevent it resolving the dispute coherently. This latter level of complexity is not very amenable to the rules devised in Part 3 to measure dissent. An application of those rules to the earlier example of *EPA v Caltex* demonstrates the effect. The clash of answers given by the Court in that case to questions one and seven means that, just as in *Dennis Hotels*, the judgments of Mason CJ and Toohey and McHugh JJ must join those of Deane, Dawson and Gaudron JJ as being not entirely in concurrence with the final determinations.

(iii) *To what extent must a judge agree with the final orders so as to concur with a majority of the court?*

The problems of classification in relation to the cases discussed above invite further consideration on a question which may assist in making sense of those difficulties — to what extent must a judge agree with the final orders so as to concur with a majority of the court? After considering a case like *EPA v Caltex*, where the Court is presented with so many opportunities for deviation, it must be asked just how strictly we require compliance with the totality of the final orders for a judgment to be accurately described as concurring, rather than being classified as dissenting.<sup>79</sup>

The judgments reported for *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*<sup>80</sup> provide a useful means of discussing this concern. Upon turning to the case report, the reader discovers that the Court was simultaneously concerned with the resolution of an unrelated matter — this being *United States Surgical Corporation v Hospital Products International Pty Ltd*.<sup>81</sup> In both cases, determination was required as to the extent to which the Federal Court, when hearing matters concerned with breaches of the *Trade Practices Act* 1974 (Cth), had jurisdiction in respect of additional claims arising under either (a) other Commonwealth legislation, namely the *Copyright Act* 1968 (Cth); or (b) common law and equitable rules. With respect to the *Philip Morris* matter, the plaintiffs had sought further relief in the Federal Court based only upon a claim of passing off

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<sup>78</sup> See text accompanying n60.

<sup>79</sup> Again, consider the strictness with which concurring judgments are assessed in respect of the United States Supreme Court: see text accompanying n23.

<sup>80</sup> (1981) 148 CLR 457.

<sup>81</sup> This particular piece of litigation between these parties is concerned with questions relating to the jurisdiction of the Federal Court. It should not be confused with the subsequent decision made in respect of those parties involving breach of contract and fiduciary duty: see *Hospital Products International Pty Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

arising from the same facts supporting their action under the provisions of the *Trade Practices Act*. Despite a variety of reasons given across the Court, there was a clear majority of Barwick CJ and Gibbs, Stephen, Mason and Murphy JJ in favour of allowing the Federal Court jurisdiction over the passing off claim, with Aickin and Wilson JJ dissenting from this finding.

It is in respect of the orders made for the *USSC v Hospital Products* that the degrees by which members of the Court concur in the orders presents cause for puzzlement. The extent to which Aickin and Wilson JJ disagree with the Court's orders is significantly reduced in this matter. They concur entirely in respect of the Court's result that the Federal Court has jurisdiction over claims arising under the *Trade Practices Act* and any associated claim for copyright infringement under the *Copyright Act*. But while the Court says that the material before it did not enable it 'to decide whether the Federal Court of Australia has jurisdiction to entertain the proceedings in so far as they involve a claim for an injunction to restrain the respondents from passing off. The Federal Court should determine for itself in the first instance whether it has jurisdiction in respect of any such claim', Aickin and Wilson JJ seemingly deny the possibility of this additional jurisdiction existing. Does the provision of a definite answer to a question the Court refrains from determining render dissenting a judgment which otherwise concurs in respect of the decisions which the Court *does* make? Before leaping to answer that question, it should be noted that Barwick CJ and Murphy J behave in the same way, though they go in the other direction. These two justices also provide a definite answer to the passing off matter — though they respond positively to the Federal Court having the jurisdiction. As such, they also do not share in the final order that there is not enough evidence before the Court and the matter should be determined at first instance. It is clear that if Aickin and Wilson JJ are seen as dissenting due to their willingness to address the passing off question in *USSC v Hospital Products*, then so should Barwick CJ and Murphy J for precisely the same reason. This is in spite of the fact that all seven members of the High Court are agreed on the issue of the jurisdiction arising under the federal legislation and there is no overall majority agreement on the passing off question. Again, the necessary rigidity of the modified *Harvard* rules will produce a result which is not readily apparent from a more substantive analysis of the case.

It should be evident to the reader that *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* has numerous features which have already been described in this paper. There is great division among the concurring judgments as to the reasons why the Federal Court has jurisdiction — in respect of both matters. There is the striking effect of a final result reached through composite which reflects only a minority of judgments such as was demonstrated in *Dennis Hotels* and *EPA v Caltex*. And there is the confusion of the headnote which seemingly views Wilson J's dissent as a concurrence. One additional feature is present — whilst the determination of multiple issues has already been discussed, this case prompts us

to consider one more hazard in attempts to pin down dissent — the simultaneous hearing of a number of matters and their resolution by one set of judgments. To what extent do such circumstances produce the possibility of multiplying one disagreement into many dissents and thus distorting any empirical study?

(iv) *Multiple Matters Reported Together — How Many Judgments?; How Many Dissents?*

As with the asking of many questions for determination, the tendency for a multiplicity of matters to be decided together has grown over the High Court's history. So far as constitutional cases are concerned, this is not so terribly surprising given the common interest which all states would have in the resolution of disputes governing the terms of the federal relationship with the Commonwealth. Nevertheless, these cases pose a particular dilemma to any researcher attempting to compile statistics on dissent.

The High Court's decision in *Re Australian Education Union; Ex parte the State of Victoria*<sup>82</sup> is a good example of this quandary. That decision actually deals with no fewer than 15 matters involving various unions and the Victorian government. The latter was challenging the jurisdictional ability of the Commonwealth's Industrial Relations Commission to make a binding award upon it setting certain stipulations as to the qualifications, length of employment, and conditions of termination of its employees. A joint judgment of Mason CJ and Brennan, Deane, Toohey, Gaudron and McHugh JJ found in Victoria's favour through an application of the *Melbourne Corporation* principle.<sup>83</sup> Justice Dawson wrote a separate judgment which disagreed with the views of the majority in significant respects — notably as to whether the disputes extended beyond the confines of the State so as to activate the Commission's power as constrained by s51(xxxv) of the Commonwealth Constitution. As to the final orders, in 14 of the 15 matters, Dawson J dissents. In the fifteenth matter — *Re Australian Federal Police Force Association; Ex parte State of Victoria* (M30 of 1994) he concurs in the Court's order that the order nisi be discharged. How are we to treat this report?

There are essentially two options. The first is that the one set of reasons given by the Court and the inter-relatedness of the matters justifies them all being lumped together as one case, in which Dawson J dissents.<sup>84</sup> That may seem reasonable, but two further considerations should be noted. Firstly, although the matters are dealt with by the court contemporaneously, they are still recognised as distinct in the layout of both the case report and the opinions delivered by the judges themselves. The fact that Dawson J can agree in the result on one indicates that the matters are at least severable to a degree and their resolution is not linked. Secondly, turn the situation on its head — what if Dawson J had concurred in 14 orders and dissented

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82 (1995) 184 CLR 188.

83 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.

84 The presence of a 'common substratum of facts' that leads to a number of proceedings constituting a 'single justiciable controversy' was recently discussed by Kirby J in *Re Wakim*, above n30 at 598.



in just the one? Would we still be as quick to regard his judgment as a single incident of dissent and overlook the high level of agreement reached in respect of the other matters? This last point revisits the discussion held in the preceding section about the extent of concurrence — is anything short of absolute mirroring of the Court's orders to be viewed as a dissent?

The alternative option is to regard the case as dealing with 15 separate matters and treat it as such for statistical purposes. In many ways this is supported by the manner in which the litigation is reported. This is truer to the nature of the matters and enables us to record that in respect of M30 of 1994, Dawson J does *not* in fact dissent. But there is a high price to be paid for this accuracy. In order to bring out Dawson J's concurrence we would be required to note his dissent in the other 14 matters. And while this is also accurate, it seems just as artificial to do so as to pretend that the matter was singular. For there *is* common ground between the matters and his Honour's dissent in 14 of them stems from his disagreement with the majority on only a few points (certainly not as many as 14) as expressed in one set of written reasons. Thus we risk grossly exaggerating the representation of Dawson J in any ranking of dissent rates.

There seems no easy solution to this dilemma, though the latter option has support in that it is the way in which similar situations are approached by the *Harvard Law Review* in its compilation of statistics. Two examples demonstrate this. In the statistics for the 1961 Supreme Court term, it is noted that Douglas J wrote a dissenting opinion in *McGowan v Maryland*<sup>85</sup> which also applies to three other cases (in the reports of these cases, the reader is cross-referenced to Douglas J's opinion in *McGowan*). For the purpose of counting the dissents of Douglas J, his one written opinion in *McGowan* is tallied as four dissents.<sup>86</sup> An even clearer example of how the multiple cases/one opinion problem is handled is found in the statistics for the 1969 term where the following note explained how tallying was affected:

Mr Justice Harlan and Mr Justice Stewart each wrote one opinion in which they concurred in the Court's result in *Williams v Florida*, 399 US 78 (1970) and dissented from the Court's judgment in *Baldwin v New York*, 399 US 66 (1970). Mr Justice Brennan, joined by Mr Justice Douglas and Mr Justice Marshall, wrote one opinion concurring in the Court's result in *Brady v United States*, 397 US 742 (1970) and dissenting from the Court's judgment in *Parker v North Carolina*, 397 US 790 (1970). Although they presented their views regarding each case in a single opinion, Justices Harlan, Stewart, and Brennan were each credited with a concurring and dissenting opinion.<sup>87</sup>

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85 366 US 420 (1961).

86 (1961) 75 *Harv LR* 40 at 88 (Table IV(A)).

87 (1970) 84 *Harv LR* 1 at 251.

Although these examples are not quite on the same scale as one opinion which applies to 15 matters, the number concerned is really not to the point. While it is not my contention that the *Harvard Law Review* be the final arbiter of all things empirical, it should be apparent from earlier sections of this paper that, allowing for modifications to take account of local institutional practices, the American model is a logical source of guidance in the face of uncertainty as to method. In the absence of any jurisdictional features which would mitigate against adoption of a similar approach in respect of the High Court of Australia, following the *Harvard* practice of tallying multiple cases, even when dealt with in one opinion, seems preferable to brushing over the distinct nature of those matters which find themselves the subject of one set of written judgments.<sup>88</sup> Perhaps the inflationary effect that this approach risks producing in an Australian study of dissent may be offset by clearly bringing anomalies to the attention of readers, so that they may receive a clearer picture as to the extent of judicial disagreement than the figures alone can convey.

### C. Summary

This section of the paper has discussed the ambiguity and choices that confront the researcher aiming to identify dissent. It has done so by discussing caselaw which demonstrates the relational interaction at the core of collegiate decision-making. The shifting of majority and minority opinion within the context of one decision presents a palpable challenge to our normal understanding of dissent. It does not, however, deprive that concept of useful meaning. Rather, it simply requires a more thoughtful and careful application of that terminology in complicated circumstances, such as those considered here.

## 5. Conclusion — The Value of this Methodology

This paper has sought to demonstrate the issues which arise upon a correct application of the terms 'dissent' and 'concurrence' when classifying judicial opinions. Whilst this exercise need not pose difficulties in some — perhaps a majority of — cases, clearly the potential exists for confusion in respect of relatively common matters. This stems chiefly from our tendency to link dissent to

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<sup>88</sup> It seems appropriate to point out the limits on the adoption of this method. It should not be applied to those cases where the States line up against the Commonwealth to settle constitutional questions so as to produce an erroneous multiplication. For example, the situation in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* and *Re Australian Education Union* may be contrasted with that found in *NSW v Commonwealth (The Incorporation Case)* (1990) 169 CLR 482 which concerned three separate actions brought by the states of New South Wales, Western Australia and South Australia in respect of the validity of various provisions of the Commonwealth's *Corporations Act* 1989. In the former two cases already reviewed in this paper, while there are enough features of commonality to justify a number of matters being handled together, different features of each do creep in to occasionally produce different results. The one answer does not simply 'do' for all litigation. But this is indeed the case in respect of the *Incorporation Case* and others of its ilk. In such circumstances, it would lead to exaggeration to count Deane J's dissent three times when it really is one judgment which applies identically to the three matters all raising the very same question of law.

fixed concepts of majority and minority voting, rather than acknowledging the fluidity which exists within the decision-making process. This degree of flux may arise due to a number of diverse factors but the two that have been particularly highlighted are the complexity of the issues which the Court must decide, which provides ample scope for a diversity of disagreement, and the 'individualistic spirit' of our judges,<sup>89</sup> which the tradition of seriatim opinions enhances.

Throughout this paper, consideration of these matters has been linked to the development of a transparent methodology which aims to provide certainty and accuracy for the researcher interested in the extent of judicial disagreement. The abandonment of the definitional distinction between concurring and dissenting judgments may perhaps be justifiable in respect of general discussions about separate opinion writing in the United States, but it cannot be supported as a means of discussing dissent in the High Court of Australia.<sup>90</sup> It certainly cannot be a feature of any empirical research which hopes to illuminate the rate of dissent in that institution.

It may be that, in light of the problems outlined in this paper, the reader is in fact persuaded that an empirical attempt to study dissent is misguided — or at least, that the method for doing so proposed here is defective. As to the latter criticism, while it must be acknowledged that, to some extent, the rigid application of definitional distinctions preserves the correct meaning of dissent at the cost of impeding attempts to gauge the full substance and range of disagreement on the Court, it must also be admitted that it ensures objectivity and certainty. Ultimately, these attributes have an unassailable value in the face of competing approaches to the measurement of judicial dissent. Any shortcomings of this method are at least explicit and may be compensated by supplementary analysis aiming at a better understanding of disagreement in general.

In response to a general conclusion that any empirical study will inevitably suffer from defects which render the exercise not worth pursuing, one can only repeat that a study of the sort proposed here will clearly help to fill a vacuum in respect of our present appreciation of dissent in the High Court. This paper advocates two core developments on this front — a more rigorous appreciation of the forms of judicial disagreement and statistical information on the same. The two are co-dependent. It is very clear that any empirical study must reveal in detail how the material under review was handled and the factors which supported the choices made by the researcher. Only then can such statistics be compiled in a way which exposes their inescapable restrictions and their limited ability in isolation to paint a truly accurate picture of disagreement in our final court. This does not prevent such a study from being inherently valuable, as well as acting as a useful basis for

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<sup>89</sup> Gleeson, above n33 at 89.

<sup>90</sup> The fact that these definitional distinctions are preserved in the statistical analysis of the United States Supreme Court featured in the *Harvard Law Review* is not in itself justification for a similar approach to be adopted here, but the reasons which inform that American methodology are just as relevant — if not more so — in this jurisdiction.

further observations about dissent including, the practice of persistent dissent and its impact, if any, upon changes in the law, and the role of voting blocs and judicial leadership across the Court's history. Reliable, albeit qualified, statistical information has an important role in exploring these areas of inquiry. That such data may be more difficult to collect and collate than we may have anticipated should not justify the abandonment of any effort to do so at all. There is much to be learnt from disagreement and dissent remains the most tangible (and thus measurable) form of this in the work of the High Court.

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